

Before the  
**Federal Communications Commission**  
 Washington, D.C. 20554

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JUN 27 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Communications Assistance for Law  
 Enforcement Act )

CC Docket No. 97-213

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**REPLY COMMENTS  
 OF THE  
UNITED STATES TELEPHONE ASSOCIATION**

The United States Telephone Association (USTA) respectfully submits its reply to the comments filed December 14, 1998 in the above-referenced proceeding.

**I. INTRODUCTION.**

The entire telecommunications industry, manufacturers and both wireline and wireless carriers, is united in its determination, relying on the plain wording of the statute, that J-STD-025 is not deficient, that the punch list items are not within the scope of the statute and that the cost of implementing the punch list items would be prohibitive. Thus, the only conclusion that the Commission can reach based on the record before it is that J-STD-025 meets the requirements of CALEA and that no modification of the standard is necessary. The overwhelming weight of the evidence presented on the record shows that DOJ's position is not supportable as it is based on misinterpretations of the requirements of the statute. The Commission must dismiss the petitions filed by the Department of Justice/Federal Bureau of Investigation [DOJ] as well as by the Center for Democracy and Technology and continue to work with the telecommunications industry to implement the J-STD-025 which some parties believe may not be feasible by June 30, 2000.

In its reply comments, USTA will address the fact that DOJ has failed to show that J-STD-025 is deficient, failed to show that the punch list items are required by Section 103, failed to show

that the punch list items are reasonably available and failed to show that the punch list items satisfy the requirements of Section 107(b). Its arguments that costs have no bearing on the Commission's decision and its interpretation of "reasonable availability" are contrary to the statute and must be rejected.

## **II. CALEA REQUIRES CONSIDERATION OF THE COST OF COMPLIANCE.**

DOJ argues that cost considerations are irrelevant to the issues raised in its deficiency petition. However, Section 107 requires that in the event that an industry standard or technical requirements are found to be deficient, new technical standards may be established which (1) meet the assistance capability requirements of Section 103 by cost effective means; (2) protect the privacy and security of communications not authorized to be intercepted; (3) minimize the cost of such compliance on residential ratepayers; (4) serve the policy of the United States to encourage the provision of new technologies and services to the public; and, (5) provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the obligations of telecommunications carriers under Section 103 during any transition period. These criteria are important because they serve to reinforce the statutory intent of CALEA. Contrary to DOJ's assertions that the telecommunications networks must be redesigned to facilitate wiretapping, CALEA established a balanced approach in order to ensure that telecommunications networks continue to operate consistent with the purpose for which they are developed, to provide telecommunications services to consumers.

DOJ misinterprets Section 107. Section 107 provides that if the industry fails to adopt a standard or if the standard is deficient, the Commission may establish standards that meet the criteria. In this case, since a standard was developed, the Commission must first find that it is

deficient. DOJ has not proved that the standard is deficient and, in fact, the record substantiates the fact that J-STD-025 fully meets all of the requirements of CALEA. The development of the standard met the requirements for consultation with DOJ found in Section 107(a). Thus, as many parties have observed, it already reflects a compromise with DOJ. Further, the standard fully implements the assistance capability requirements of Section 103. Thus, the Commission cannot find that the standard is deficient and there is no justification for pursuing a Section 107 analysis.

However, assuming for the sake of argument that J-STD-025 is deficient, the Commission cannot adopt the punch list items unless those items are shown to meet the criteria listed in Section 107(b). “In taking any action under this section, the FCC is directed to protect privacy and security of communications that are not the targets of court-ordered electronic surveillance and to serve the policy of the United States to encourage the provision of new technologies and services to the public.”<sup>1</sup> The Commission does not have the authority to adopt new technical standards or requirements that do not meet all of the criteria. Thus, contrary to DOJ’s assertion, the Commission correctly asked for information on the costs associated with each of the punch list items. The burden was on DOJ to prove that its technical requirements meet the Section 107 criteria, including those on costs, and DOJ failed to meet its burden.

Despite the fact that the Commission cannot adopt the punch list items without showing compliance with the Section 107 criteria, the DOJ continues to refuse to provide any information as to cost. In a December 4, 1998 letter to Attorney General Reno, the telecommunications industry trade associations requested that DOJ provide the Commission with the basis for her statement to Congress that moving CALEA’s grandfather date would “cost the government \$2

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<sup>1</sup>H.R. Rep. No. 103-827, 103d Cong., 2d Sess. Pt. 1 at 27.

billion.” In its comments, DOJ states that it does not possess any information on cost, only price. This statement is disingenuous at best. DOJ may not have information regarding the manufacturer’s costs, but certainly has information regarding the price that manufacturers will charge the carriers and from this infers a cost to the government. The price that the manufacturers will charge carriers for CALEA compliant equipment constitutes part of the costs which carriers will incur to provide CALEA capability to law enforcement. Apparently, while some of this information can be provided to members of Congress, it cannot be provided to the Commission. Given the absence of evidence to the contrary, one can only assume from the references to cost by the Attorney General that the DOJ’s estimated cost of developing CALEA compliant equipment, based on the price information it obtained from some manufacturers, is \$2 billion in addition to the costs which CALEA requires the government to reimburse. Of course it is not clear if this amount includes both the standard and the punch list items or just the standard. That amount definitely does not include the additional costs which the carriers will incur to install and deploy CALEA-compliant equipment.

In the absence of information on the record regarding the manufacturing costs of implementing the standard as well as the DOJ wish list, carriers have provided information on the costs which they will incur to implement CALEA capability and capacity in every switch. USTA estimated that implementation costs for its member companies may be anywhere from \$2.2 to \$3.1 billion. As USTA explained, capability costs consist of software costs, hardware costs to support the software functions and delivery of surveillance, training and installation. Implementation costs will be impacted by the deployment of CALEA compliant equipment. Capacity costs include the cost of the hardware. Some manufacturers are planning to provide the J-STD-025

capability over several software loads which could require out-of-cycle software purchases again increasing the costs of implementation. Of course some switches may require additional software loads anyway due to the vintage of the switch. Hardware costs will vary depending upon the architecture of the switch.

DOJ also argues that capacity has no bearing on the Commission's Section 107 analysis. As explained above, implementation costs will be affected by the capacity requirements adopted by the FBI. As USTA noted in its comments, the FBI has refused to cooperate in developing traffic models to determine the number of call data and call content channels which may be required per switch. CALEA compliant equipment cannot be designed without consideration of the amount of traffic which must be accommodated. Capacity is a fundamental element of the design and engineering of any switch. USTA estimates that the FBI's capacity rules will increase the costs of implementation by a factor of four or more. Clearly, capacity is an essential factor in resolving whether the Section 107 criteria can be met. The DOJ has failed to meet its burden in this regard by delaying the release of its capacity rules for three years and then refusing to cooperate with industry to develop necessary traffic models.

While the DOJ did not make the case that the J-STD-025 is deficient, without the necessary cost information to determine the cost which carriers will incur to equip their switches with CALEA-compliant software, the Commission cannot find that the punch list items meet the Section 107 criteria. Congress obviously contemplated that the costs to implement CALEA, based on a "narrow interpretation" of the statute could be satisfied by \$500 million. The actual costs cited in the record compel the Commission to consider costs when deciding whether or not to add more features and further increase the costs of implementing CALEA as DOJ requests.

Consumers must be assured that the Commission has undertaken to minimize the costs of implementing this statute as required by Section 107(b)(3). Particularly when the capability assistance requirements of Section 103 can be fully met through a least costly alternative, there is no reasoned basis for the Commission to adopt the DOJ's more expensive punch list. The punch list must be rejected.

### **III. DOJ'S PROPOSED DEFINITION OF 'REASONABLE AVAILABILITY' IS CONTRARY TO THE STATUTE.**

The Commission must also reject DOJ's proposed definition of reasonably available, as it is contrary to the plain wording and the intent of the statute. As the comments explain, the legislative history substantiates the fact that CALEA was adopted to maintain existing capabilities for electronic surveillance that were "reasonably available" to the carrier. The definition of reasonably available contained in J-STD-025 fully satisfies Congress' intent by providing for the collection of call-identifying information at an Intercept Access Point (IAP). The DOJ's proposed definition unjustifiably expands the requirements of CALEA to include collection of call-identifying information anywhere in the network. This would require modification to network protocols, in violation of Section 103(b), for signals and progress tones to be returned from any point in the network to the switch for delivery to law enforcement. This would be extremely complicated and costly to implement as it would require existing standards to be modified, redesign of switches and installation by all carriers in all networks.

DOJ contends that the definition of reasonably available contained in the J-STD-025 will prevent law enforcement from obtaining post-cut-through dialing. It is clear from the record that post-cut-through dialing is not call identifying information and is not reasonably available. Credit card numbers and automated queuing system responses are unrelated to call routing and

completion. The delivery of this information would not protect the privacy of certain content communications, the interception of which is not lawfully authorized. J-STD-025 does allow law enforcement to obtain post-cut-through dialing and network progress tones by using their existing monitoring equipment connected to a call content channel (CCC). The DOJ has objected to this approach because law enforcement does not want to incur the cost of leasing a CCC for a pen register court order. Instead, DOJ proposes that carriers and their customers incur the cost of incorporating this capability into the design of a switch. This is another example of DOJ attempting to expand the intent of CALEA to preserve existing capabilities. As USTA pointed out in its comments, since 1977 when post-cut-through dialing began to be deployed, the only way law enforcement could intercept post-cut-through digits has been for law enforcement to obtain and pay for a private line connection per intercept (the equivalent of a CCC). DOJ may not consider costs to be relevant when it contends there are no costs or that any costs incurred must be borne by carriers. However, such a result is completely contrary to the plain wording of the statute. DOJ's proposed definition of reasonably available must be rejected.

#### **IV. THE DOJ'S ASSERTIONS REGARDING THE IMPLEMENTATION OF CALEA STANDARDS ARE WITHOUT MERIT.**

The DOJ states that compliance with any new technical requirements adopted by the Commission should be required no later than eighteen months after the new standards are published. The DOJ also warns that permitting the industry standards setting body, TIA's Committee TR45.2, to work on any such requirements will expose the Commission to legal action. These assertions are without merit because they are contrary to the statute and are contrary to the process by which technical requirements are developed and implemented into network architecture.

As USTA pointed out in its comments, the statute defers to the industry to develop any and all standards. The legislative history clearly states that the industry shall decide how to implement law enforcement's requirements based upon a narrow interpretation of those requirements with deference to be given to industry standards organizations. Thus, the Commission's tentative decision to have TR45.2 incorporate into J-STD-025 any additional capabilities adopted by the Commission is required by the statute. It is clear that law enforcement lacks any understanding of telecommunications networks and the complexities involved in implementing any of its proposed additions. The industry has already demonstrated its commitment to developing any new standards within TR45.2. The only delays likely to occur in this established process are as a result of law enforcement's continuing refusal to cooperate.

It is equally ill-advised to adopt any prohibition against further extensions of the compliance deadline as suggested by the DOJ. Such a result is clearly contrary to Section 109 of the statute. Further, it is not certain that the current deadline will be met. Not all manufacturers have indicated that CALEA compliant equipment will be available by June 30, 2000. A blanket prohibition ignores the realities of the market and the costs, effort and time required to implement CALEA capabilities.

USTA supports TIA's recommendations that any additional capabilities be provided three years after the initial compliance date. This will provide carriers with the ability to concentrate on implementing the J-025-STD requirements that are not modified and will allow switch manufacturers sufficient time to design and develop the software and hardware capabilities required and allow carriers sufficient time to deploy the new upgrades.



**V. DOJ HAS FAILED TO PROVIDE ANY EVIDENCE JUSTIFYING THE INCLUSION OF ANY PUNCH LIST ITEMS IN J-STD-025.**

DOJ raises no new arguments and presents no new evidence to justify including any of the punch list items in J-STD-025. The Commission should reject the DOJ's suggestion that its Appendix 1 is an accurate description of the capabilities included in the punch list. The TR 45.2 ESS Ad Hoc Group has been attempting to work with law enforcement for more than a year to clarify the vague descriptions contained in that Appendix. Appendix 1 cannot be used as a substitute for an industry-developed standard. The record before the Commission unequivocally refutes the DOJ's rationale for the punch list items. USTA and all of the other parties in this proceeding have provided ample evidence to dispute all of DOJ's claims regarding the punch list. However, there are two additional points raised in DOJ's comments which must be specifically addressed.

The DOJ has impermissibly expanded the scope of conference call content by stating that a subscriber's equipment and facilities encompass all of the elements of the carrier's network that support and are identifiable with the services that the carrier provides to the subscriber. Prior to enactment of CALEA, law enforcement only received call content when the intercept subject was on the conference call. The punch list unjustifiably expands this capability to include content even when the subject went on hold or dropped the conference call. DOJ's comments further expand the capability to include all of the elements of the carrier's network which would include "meet-me" type conference call circuits which are not part of the access switch and which could even be owned by another provider. This is indicative of the "open-ended" nature of the DOJ's proposals which are contrary to the purpose of CALEA to preserve existing capabilities, not to expand existing capabilities, and do not facilitate the standards setting process.

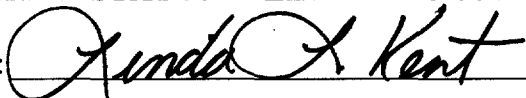
The DOJ also grouped surveillance status, feature status and continuity check tone into one category it called surveillance integrity. The record reveals no basis for this capability as it is beyond the capability assistance requirements of Section 103. DOJ has not provided any evidence where a wireline carrier has not supported law enforcement with the set-up and provisioning of electronic surveillance and with the transport of intercepted information. USTA is confident that all of its members will continue to cooperate with law enforcement in this regard as they have in the past. There is no need for surveillance integrity requirements as they are not call identifying information and would increase the cost of compliance. The Commission should not alter its tentative conclusion that these features are not required by CALEA.

#### **VI. CONCLUSION.**

DOJ's proposals will undermine the balanced approach to CALEA clearly intended by Congress and cannot be supported by the plain wording of the statute itself. The record overwhelmingly refutes DOJ's claims. The Commission must reject the deficiency petitions before it and work with the telecommunications industry to implement J-STD-025.

Respectfully submitted,

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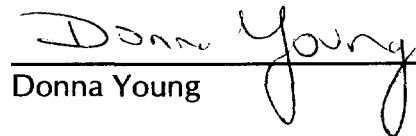
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**CERTIFICATE OF SERVICE**

I, Donna Young, do certify that on January 27, 1999, copies of the accompanying Reply Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.

  
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